IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

Short Cause Suit No. 537 of 1988

M/s Madhav Corporation,
a registered partnership firm
carrying on business at 402,
Sujata Chambers
1/3, Abhechand Gandhi Marg
Bombay 400 009 ..Plaintiff

vs.

Amritlal Chemaux Limited
having their registered
office at Rang Udyan
Sitaladevi Temple Road
Mahim, Bombay 400 016 ..Defendants

Shri M.P.Vashi for plaintiffs
Mr.Vaze for defendants

CORAM: S.C.DHARMADHIKARI J
19th, 26th September,2007
and 3rd October, 2007

ORAL JUDGMENT:

1. The suit has been filed by the plaintiffs for recovery of a sum of Rs.3,50,000/- together with interest on Rs.2,98,000/- at the rate of 18% p.a. or at such other rate as this Hon'ble Court deems just and proper from the date of the suit till payment and costs.

2. The plaintiffs claim to be a partnership firm duly registered under the Indian Partnership Act, 1932. It carries on business, inter alia, as Importer and Exporter. The defendants are a

limited company registered under the Indian Companies Act, 1956. It is also recognised as Export House. The defendants are also carrying on business as importer and exporter.

3. The plaintiffs' case is that on or about 21st September, 1984 pursuant to the discussions which the plaintiffs had with one Mr.Pratapbhai Jassani, broker of the defendants, the defendants offered to the plaintiffs their import licence bearing no.P/W/3003791 dated 24th June, 1983. The offer of the defendants was for the purpose of import of Propylene Glycol USP (hereinafter referred to as the "said product"). The plaintiffs' further case is that CIF value of this product is Rs.8,25,000/- At the time when the defendants represented to the plaintiffs that their import licence was valid and that this product/material could be imported on the said licence. For utilisation of the said licence, according to the plaintiffs, the defendants desired that the plaintiffs should make payment of premium at the rate of 7.25% of the CIF value so also the margin amount of 5% of CIF value. This offer was accepted by the plaintiffs. The plaintiffs agreed to purchase the said licence from the defendants for the purpose of utilising the same for import of the said product.

4. This arrangement was recorded by the plaintiffs in letter dated 21st September, 1984 and the plaintiffs forwarded the Intent of M/s Chemet bearing No.5247 dated 19th September, 1984 to the defendants for import of about 100 M.T. of the said product on the terms and conditions set out in the said Intent. Along with the said letter, the plaintiffs also forwarded to the defendants two cheques, both of the same date for premium amount as agreed. The cheques were of Rs.58,000/- and Rs.40,000/- respectively. The plaintiffs also instructed the defendants to establish the Letter of Credit with the conditions mentioned in the letter dated 21st September, 1984.

5. After encashment of the cheques the defendants opened the Letter of Credit with Indian Overseas Bank, Mahim Branch on 3rd October, 1984.

6. It is alleged by the plaintiffs that thereafter on or about 8th October, 1984, the defendants got antedated agreement in duplicate prepared in the format of letter purporting to be of 10th September, 1984 and got the same signed by the plaintiffs stating that the same was formal and usual. The case set up by the plaintiffs in para 5

is that this agreement was signed in good faith and without reading its contents. On the same day, the defendants also got the indemnity bond signed in similar manner. It is plaintiffs' case that the plaintiffs subsequently learnt that in the agreement dated 10th September, 1984 and indemnity bond the defendants incorporated several statements which were false to their knowledge. The defendants incorporated several terms which were never agreed upon.

7. However, at the same time, the plaintiffs did not dispute that pursuant to the said arrangement, consignments of the said product were imported by making payment. The defendants informed the plaintiffs that documents are having some discrepancies. Initially the plaintiffs were reluctant to accept the documents as there was gross delay in presenting the document. But since the plaintiffs had commitment in the market to deliver the goods, later on by their letter dated 31st December, 1984 they informed the defendants that the discrepancies were agreeable to them. It is the case of the plaintiffs that the goods had arrived earlier and were incurring demurrage but in the light of the above they agreed to accept the documents. They also instructed their clearing

Agent to clear the said goods.

8. It is the case of the plaintiffs that in the mean time they learnt through their clearing agent that the consignments of the said product imported on the defendants' licence was not being cleared by Customs Authority on the ground that the material was wrongly imported. The licence was not valid for import of O.G.L. items (Open General Licence Items). The objection of the Customs Authorities was that the licence being additional licence OGL items were not permitted to be imported during extended period. This fact was put on record by the plaintiffs by their letter dated 12th January, 1985 and the defendants were requested to follow up the matter with the Customs Authorities for clearance of the consignments. The defendants had received this letter but, according to plaintiffs, there was no response. In the mean time the defendants by their letter dated 12th January, 1985 which was received by the plaintiffs on 14th January, 1985 replied to the plaintiffs' letter dated 31st December, 1984 and informed the plaintiffs that they should make payment for retirement of the documents and in case the documents were not retired by making payment within two days the bankers will be instructed by the

defendants not to accept the documents. The plaintiffs pointed out to the defendants by their letter dated 14th January, 1985 their difficulty in clearance of the consignments from the customs authorities and raised an issue of invalidity of the licence. The contents of the letter are referred to in para 8 of the plaint. Thereafter, the plaint proceeds to allege that the plaintiffs informed the defendants that despite the difficulties with regard to the licence, the documents are returned by the defendants, they shall do so at their sole risk and responsibility. The plaintiffs will hold them responsible for the loss of profit and reputation so also for damages and loss that they may suffer. The plaintiffs, therefore, desired the defendants to first get the documents cleared from the customs authorities. However, there was no reply to the letter for a long time.

9. It is in these circumstances that the plaint alleges that the defendants put the plaintiffs to a wrongful loss by making wrongful gain for themselves. They offered licence to the plaintiffs for import of the said product knowing fully well that as against the said licence the said product could not be imported. There is suppression of

material defects in the licence by the defendants. For these false and fraudulent representations the defendant collected a sum of Rs.98,000/-. The plaintiffs thus estimate their damages at Rs.2,00,000/- for loss of profit at Rs.2/- per K.G. being difference in cost price and price that they would fetch by sale of the imported goods. The loss of reputation as head of damage is not separately assessed and total claim is restricted by the plaintiff to Rs.2,00,000/- and that is how the decree is claimed in the sum more particularly set out in the particulars of claim at Exh.F to the plaint with interest on the grounds stated in para 13 of the plaint.

10. Upon the plaint being lodged, the writ of summons was duly served on the sole defendants. The sole defendants filed their written statement in this Court on 25th April, 1990. Apart from stating that the plaint is not disclosing any cause of action so also raising the plea of Limitation, the written statement proceeds to state that the entire claim is false, frivolous and vexatious. The plaintiffs have not approached the Court with clean hands. The correspondence and relevant documents have been suppressed.

11. While dealing with para 2 of the plaint, the written statement avers that on 21st September, 1984, discussion was held between the brokers acting on behalf of the defendants with the plaintiffs. It is true that the defendants offered to the plaintiffs their import licence. It is admitted that the licence was offered for import of the said product. The broker has been instrumental in introducing the parties. However, it is stated that the discussions were held much prior to 10th September, 1984 and not on 21st September, 1984. The terms were also agreed as stated in para 7 of the written statement.

12. The written statement alleges that in the course of a meeting prior to 10th September, 1984, the plaintiffs examined the import licence and satisfied themselves about the validity period thereof. It is only when all this was done that the terms and conditions were agreed upon and incorporated in the agreement in the form of letter dated 10th September, 1984. The terms and conditions are not disputed so also the fact of opening of Letter of Credit and payment of Rs.98,000/- However, the defendants have referred to several letters in para 7 of the written statement. It is stated that on 17th December,

1984 vessel arrived with the said material on Board. This fact was duly informed by the defendants and there was no delay. However, the defendants were surprised to receive a letter dated 18th December, 1984 of the plaintiffs stating therein that the plaintiffs did not desire to accept the owners' documents. Thus, the plaintiffs expressed their unwillingness to take delivery of the goods. The defendants thereafter sent a letter dated 19th December, 1984 in which events of 17th December, 1984 are recorded.

Resumed on: 26.9.2007

13. In paras 7 and 8 of the written statement, the defendants allege that the plaintiffs were deliberately avoiding to take delivery. They took no positive steps to retire the documents but simply whiling away time. In fact, it was offered by the defendants that if plaintiffs incur any expenses on account of retirement of documents the defendants would have reimbursed the same. The defendants state that they were fully abiding by their obligations under the agreement. The defendants specifically allege that the plaintiffs have suppressed the correspondence mentioned in para 8 of the written statement. The defendants

urge that it was contractual obligation of the plaintiffs to pay the customs and other dues and unless they pay and discharge their liability, it was not possible for the defendants to clear the said consignments.

13. In para 9 of the written statement, the defendants urge that the agreement dated 10th September, 1984 was executed in the form of a letter which was confirmed, accepted and agreed by the plaintiffs. Once again, they accused the plaintiffs of suppressing the agreement and indemnity bond. The defendants deny any oral agreement allegedly arrived at on 21st September, 1984. The defendants submit that in absence of any particulars with regard to oral agreement and the persons who are responsible for the same, it is not possible to accept the version of the plaintiffs. The defendants submit that they would not undertake importing 100 MT of materials on behalf of the plaintiffs without any writing. Thus, there was no written agreement as stipulated in the foregoing paras of the written statement.

14. With regard to correspondence and more particularly the letter of January, 1985 the defendants urge that the plaintiffs acquisad and

admitted the agreement. Thus, it is the contention of the defendants that the plaintiffs have not alleged that the agreement dated 10th September, 1984 and Indemnity bond dated 8th October, 1984 were antedated. Such a plea was never raised in the correspondence and it is for the first time in plaint that the same has been raised as an afterthought. Thus, with regard to the averments in the plaint, there is a detailed written statement on record clarifying the entire position with regard to the consignments and denying liability to pay the sum as demanded. It is denied by the defendants that there was any defect in the licence. The pleading in that behalf in the written statement is that several consignments entered the Indian water with the aid of the said licence and it is inconceivable that any objection would be raised with regard thereto. In para 12 of the written statement, this is what the defendants have stated:

> "...the defendants are not aware of and do not admit that the plaintiffs had learnt through their clearing agents that the consignments of "Propylene Glycol USP" were not being cleared by the customs authority on the ground that the materials were

> wrongly imported or that the additional licence of the defendants was not valid for import of OGL documents. The defendants are also not aware of and do not admit that there was any objection of the customs authority that the under additional licence, which the plaintiffs had satisfied themselves before entering into the said Agreement dated 10th September, 1984 the import of OGL item was not permissible during the extension period of validity."

15. Thus, by raising the aforesaid pleas, the defendants urged that the suit be dismissed. On the basis of the plaint and written statement filed in this Court, on 14th December, 2006 the following issues were framed.

> 1. Does the plaintiff prove that the agreement and indemnity bond dated 10th September, 1984 and 8th October, 1984 are false and fabricated and not binding on the plaintiff?
>
> 2. Does the plaintiff prove that there was any defect in the defendants' licence?

3. Does the plaintiff prove that the defendant is liable to refund the sum of Rs.98,000/- with interest @ 18% p.a.?

4. Does the plaintiff prove that the defendant is liable to pay damages of Rs.2,00,000/- with interest @ 18% p.a. to the plaintiff for loss of profit and reputation in market?

5. What decree and order?

R E A S O N S

15A) This Court while framing the issues directed filing of Affidavit of Documents and completion of inspection. Thereafter the plaintiffs were to file the affidavit in lieu of examination in chief. This Court appointed a Commissioner to record evidence.

16. After completion of the above steps, the sole witness examined by the plaintiff was cross examined by the defendants. The defendants did not lead any evidence.

17. The plaintiff examined Ketan S.Seth, one of its partners, and much emphasis has been laid on his deposition and more particularly paras 3 to 5 thereto. The plaintiffs' witness states that the defendants offered the plaintiffs to import the said product of CIF value of Rs.8,25,000/- on the import licence bearing no.P/W/3003791. The witness states that on the defendants' representation to the plaintiffs that the import licence was valid and the material/product could be imported against the same that the plaintiffs decided to import the same. . Further agreement also speaks of the acceptance of the offer of the defendants made to the plaintiffs to import 100 M.T. of the material. It is deposed that pursuant to this agreement, the indent of M/s Chemet dated 19th September, 1984 for import of about 100 M.T. of the said product was forwarded by the said letter dated 21st September, 1984 by the plaintiffs to the defendants along with two letters and two cheques, details of which are more particularly set out in para 4 of the deposition. It is also stated that the cheques were encashed and the defendants thereafter opened Letter of Credit (L/C) with Indian Overseas Bank, Mahim Branch on 3rd October, 1984. Further, the witness deposes that on or about 8th October, 1984

the defendants got antedated agreement in the form of letter dated 10th September, 1984 signed by the father of the deponent and partner of the plaintiffs' firm.

18. The witness further deposed that the material was imported and reached Mumbai in the month of December, 1984. The defendants desired that the plaintiffs should retire the documents by making payment. However, it is stated by the witness that the plaintiffs were reluctant to retire the documents as quantity was exceeding by 5 M.T. and there was gross delay in presenting the said documents. The witness further states that despite this reluctance on account of commitment made in the market, the plaintiffs agreed to retire the documents despite the discrepancies and delay.

19. Thereafter in para 7 of his deposition, the witness states thus:

> "....The objection of the Customs Authorities was that the said licence being an additional licence, the import of OGL items was not permitted during the extended period of validity thereof. The plaintiffs vide their letter dated 12.1.1985 placed all

> the facts on record and requested the Defendants to follow up the matter with the customs authorities for clearance of the said material. The said letter is signed by my father, one of the partners of the plaintiffs. I am familiar with his signature and I identify the signature of the said letter. The contents of the said letter are correct."

The witness thereafter speaks about the correspondence and states that the invalidity of the licence was a fact brought to the notice of the defendants through their broker Mr.Jassani during telephonic conversation and the defendants and the said Mr.Jassani suggested that the defendants would retire the documents and arrange to put the material in bond to avoid demurrage and other charges to which arrangement the defendants had agreed. The witness states that he made it clear to the said Mr.Jassani that he will hold the defendants responsible for the loss of profit, reputation and all other loss and damages. It is in such circumstances, he accuses the defendants of failing and neglecting to get the documents cleared from the customs authorities. In paras 9 and 10 of the deposition the witness of the plaintiffs states

thus:

> "9. I say that the Defendants themselves have vide their letter dated 25.4.1985 addressed to the Indenting Agent viz. M/s Chemet of the Foreign party pointed out that as the documents were received late and as there were discrepancies in the original documents with the letter of Credit, the bankers of the Defendants have returned the documents to the negotiating bank. The defendants have further stated that in view of an inordinate delay in receipt of the original documents, the discrepancies and in view of the heavy demurrage, the defendants had decided not to retire the documents and take delivery of the goods....
>
> 10. I say that vide our Advocate's notice dated 5.6.1985, the plaintiff called upon the defendants to refund the said amount of Rs.98,000/- wrongfully collected from the defendants to the plaintiffs. The plaintiffs also demanded further sum of Rs.2 (two) lacs as damages for the loss of profit with the plaintiffs had suffered in the transaction. Vide a reply dated 24.6.1995,

the defendants raised false contentions. ...."

20. This witness has been cross examined by the defendants. Reliance is placed upon his cross examination to demonstrate that the version of the plaintiffs has not been shaken in any manner. The witness has not been cross examined on vital issue is the submission.

21. Before the cross examination, the correspondence and the documents which are part of the pleadings have been admitted with their contents and, therefore, duly exhibited on record. Before me, there is no dispute that Exhibits P-1 to P-9 are the documents which have been tendered on behalf of the plaintiffs whereas the documents Exh.D-1 and Exh.D-2 are tendered on behalf of the defendants. From a perusal of the documents which have been filed by the defendants, several documents are admitted. Some are exhibited as Exh.D-3 to D-17.

22. Exhibit D-16 is the licence whereas Exh.D-17 are the copies of the plaint and judgment in City Civil Court Suit No.5846 of 1988.

23. The entire cross examination is in question answer form. Cross examination reveals that the plaintiffs are in import and export business in chemicals like Propyline Glycole (the said product). The plaintiffs' witness admits in the cross examination that the plaintiffs did not have any licence to import and export the produce like Propylene Glycol. In fact, he states that there was no such licence prior to 1984 and the practice of the plaintiffs was to utilise the licence that of the defendants and others for import. In reply to the question no.18 the plaintiffs' witness states that he knew some of the export houses who have import licences and such information was available to him through brokers. However, the witness admits that the plaintiffs have no brokers. The practice when overseas supplier places any order on behalf of the plaintiffs is stated by him in answer to question nos. 21 and 22. In reply to question no.23, the witness states that the plaintiffs ensure that the licence was useful for the intended import by relying upon the assurance and reputation of the licence holder. The witness states that he had not personally instructed the Advocate to draft the plaint but his father did. The correspondence is also signed by his father. The witness of the plaintiffs admits that payment

for the imported goods will have to be made by the plaintiffs provided the import is proper. The witness admits that the plaintiffs were responsible for clearance of the goods, except the licence. With regard to the opening of the letter of credit and receipt of documents the witness admits that they have in deed been received. The discrepancies are also admitted.

24. Question No.36 is in the following term.

> Q.36: Did you make the payment?
>
> A: No, because the consignment which was sent was not getting cleared by the Customs due to deficiencies in the licence.

Rest of the cross examination is not material save and except Question Nos.38 to 41 where the witness admits that earlier also a product Pyridine was imported and since there were some disputes a suit was filed in the City Civil Court which the plaintiffs lost.

25. I am not referring to other questions put in the cross examination save and except question no.65 which is posed and answered as under:

Q:65: Is it the same licence under which the suit goods were imported?

A: The details of the licence were not provided to us at the time of opening the L/C. The licence was given to us when the goods arrived at Bombay Port and the said licence was given for the purpose of clearing the goods from the Customs after completing the process and formalities as were required at that time.

26. A suggestion was also put that the suit is false and frivolous which is of course denied.

27. The submission of Mr.Vashi appearing on behalf of the plaintiffs is that issue nos. 1 and 2 are proved in as much as the material produced by the plaintiffs and their witness so also his deposition shows that the agreement and indemnity bond are false and fabricated and not binding on the plaintiffs so also there was defect in the defendants' licence. Mr.Vashi submits that the case put up in the written statement and denials therein are of no assistance because the defendants have not stepped into the witness box. The

defendants cannot rely upon any admission or contradiction in the version of the plaintiffs, more so, when the licence in question did not cover the item Propylene Glycol. He submits that the licence did not permit import of this item. Open General Licence (OGL) items did not mention the material which was imported by the plaintiffs. He submits that as on the date of the order placed by the plaintiffs this material was not mentioned in the item. He submits that the item is Open General licensed item and that fact is not disputed. Mr.Vashi refers to Exh.P-1 and Exh.P-3 and submits that the state of mind prior to the written documents is irrelevant. He refers to the licence and para 7 of the examination in chief and submits that there is no cross examinationon the vital and material issues. A decree must, therefore, follow.

28. He submits that the position is similar with regard to issue no.2 in as much as paras 10 and 12 of the examination in chief have gone uncontroverted. There is no cross examination. He submits that there is no question put to the witness that the material was not available nor was any suggestion given with regard to the validity of the licence. In absence of any such questions in the cross examination nor a suggestion with regard

to the falsity of the assertion would mean that the case of the plaintiffs stands proved. He submits that once the defendants have not examined any witness nor has cross examined the plaintiffs on the plaintiffs' case in its entirety, then, such omission is fatal. The omission is not capable of being condoned and suit must, therefore, be decreed. Mr.Vashi has invited my attention to para 7 of the plaint and denial thereto in paras 11 and 12 of the written statement. He submits that the same is vague.There is no positive case set up in the written statement. In such circumstances, the case is proved and decree must, therefore, follow.

29. On the other hand Mr.Vaze appearing for the defendants submits that oral evidence in this case is of not much assistance. The entire controversy is based on the documents which have been executed at the relevant time. He submits that role of the defendant was extremely limited in as much as they identify the foreign supplier and local consumer. Thereafter, they assist in procuring the material. He submits that there is nothing in the oral evidence which would enable this Court to conclude that the plaintiffs have proved their case. He submits that contracts in Exh.P-1 and P-12 have been admitted. The conditions which have been put

by the plaintiffs are also not in dispute. Further, it is undisputed that the plaintiffs have waived the discrepancies. When called upon to make payment and retire the documents, the payment has not been made on the alleged ground that licence is defective. Mr.Vaze submits that this is completely false plea and raised merely to avoidmaking payment. Mr.Vaze has invited my attention to the correspondence, namely Exh.D-12 and Exh.D-13 so also Exh.P-4. He submits that on 12th January, 1985 there is a change of stand on the part of the plaintiffs and as an after thought a vague plea has been raised that the licence is not valid.

30. According to Mr.Vaze, merely stating that the licence is not valid is not enough. The plaintiffs must disclose the particulars about their satisfaction that the licence is invalid. They were obliged to give appropriate details and particulars including the name of the Customs Clearance Agent. There is neither any written communication with the Customs Authorities nor is any order passed with regard to the consignment. He criticised the letter dated 14th January, 1985 and submits that the contents thereof are vague and procured. No details have been set out. He submits that the correspondence would reveal as to

how the plaintiffs consistently and conveniently changed their stand. If the broker was involved in the entire deal then in the correspondence prior to January, 1985, there is no reference to the broker. Even the assertion with regard to telephonic discussion is vague and appears for the first time at Exh.P-6. Further, the statement that one or two consignments were not cleared is a hopelessly vague statement. There is no reference to the consignment book but a general plea raised. He submits that no consignment of the product in question was held up. It would be evidenced from the licence and annexures thereto that the said product has been imported by the defendants for some other parties as also the plaintiffs. In such circumstances, reasons assigned for not making payment vary from time to time. The plaintiffs addressed a letter and defendants cannot be said to be guilty of any delay because they have been prompt enough to respond.

31. Mr.Vaze has emphasised once again the role of the defendants.He submits that the Indending Agent was identified and the plaintiffs negotiated the commercial terms with M/s Chemet. Thereafter, they approached the defendants with a request to allow use of their licence. Further request of the

plaintiff was that the letter of credit be opened in terms of the conditions laid down by the plaintiffs in Exh.P-1. The defendants were exposed to all the consequences, if the documents were not retired. They incurred the risk by approaching the Bank and getting the Letter of credit opened. The defendants had undertaken this risk and the plaintiffs had merely to retire the documents and make payment. That was avoided by taking a false plea with regard to invalidity of the licence. He submits that even the plea regarding the agreement being fabricated and antedated is raised for the first time in the Advocate's notice dated 5th June, 1985 (Exh.P-A). Thus, whichever version was convenient to be raised has been raised without any supporting material. Similarly, till the date of Advocate's notice no plea has been raised that the licence is invalid. There is no pleading and no evidence with regard to invalidity of the licence. Mr.Vaze submits that the broker Mr.Jassani was also not examined and his non examination is fatal.

32. Mr.Vaze has invited my attention to the licence and pointed out what is not permissible for being imported under the import policy of 1984-85 is prohibited, otherwise, everything else can be imported under the subject policy. He has invited

my attention to condition no.1 of the revalidation sheet dated 27th July, 1984 which is appendix to the licence. He has also invited my attention to the items which are mentioned in the Appendix to the licence. He submits that the Indian Overseas Bank is a Nationalised Bank. He submits that such letters of credit are opened by the Nationalised Banks frequently. It is not as if the banks are dealing in such transactions and matters for the first time. No Nationalised Bank would ever open a letter of credit unless it is satisfied that the items are capable of being imported. The fact that the letter of credit was opened is supporting the version of the defendants that the licence was not invalid. He has also referred to other items which were allowed to be imported against the said licence. He has referred to the consignment of 17th September, 1984 mentioned at item no.1 of the list of Import items. He has also referred to entry no.7 in the Appendix to the licence. He submits that there is a counter signature of the Customs Authorities below the entry, which is dated 15th January, 1985. He submits that the licence was revalidated for six months from 27th July, 1984 to 27th January, 1985. In such circumstances, the plea that the licence was defective is totally baseless and devoid of any merit.

33. He submits that the above facts are apparent from a perusal of the licence and its annexures which are exhibited on record. The plaintiffs are conveniently silent about these crucial aspects. Once the contents of the licence are undisputed and if the same are seen in the backdrop of the prevalent import policy, then, nothing survives in the case of the plaintiffs.

34. Mr.Vaze has invited my attention to the relevant extract of 1983-84 import policy. He submits that it is undisputed that the defendants are export house.He submits that pages 61 to 64 of the policy specifically state that under 1984-85 Import Policy, the additional licence of the defendants permits import of OGL items. He has invited my attention to para 257 (internal page 84 of the Import Policy) and submits that the licence was valid for import of OGL items as well. In such circumstances, he submits that there is no substance in the grievance of the plaintiffs. Further, the plea is an after thought because the transaction is of September to December, 1984 whereas the suit is filed in 1987.

35. Mr.Vaze has pointed out that grounds of fraud,

misrepresentation and fabrication were also made subject matter of suit no.5846 of 1988 which is between the same plaintiffs and defendants. That suit was filed in the City Civil Court and has been dismissed after complete trial. In the present case also the plea of fraud is vague. There are no materials and there is no evidence. In such circumstances, merely because the product in the present suit and that of the City Civil Court suit is not the same, should not make any difference to the outcome. He submits that on the issues which are common in both the suits findings rendered therein are binding unless set aside and, therefore, the plea of resjudicata can also be raised by defendants.

36. Another aspect which was high lighted by Mr.Vaze is that signatory to the agreement dated 10th September, 1984 is Suresh Shah, who is father of the plainitiffs' witness. Suresh Shah has not stepped into the witness box. In these circumstances and when there is no compliance with the mandate of order VI Rule 4 of the Code of civil Procedure, the suit deserves to be dismissed in toto.

37. There is no substance, according to Mr.Vaze,

in the claim of damages in as much as there is no pleading in regard to the quantum and extent of damages sufferred. The prevalent market conditions, price, local purchasers and other details are also not required. He submits that thus it is a pure and simple case of forfeiture of initial/ernest payment because the plaintiffs have failed to retire the documents and make payment of consignments/goods upon their arrival in domestic market.

38. Thus, when the correspondence is admitted, documents speak for themselves so also the pleadings then merely because there is no cross examination or there is omission to make some suggestion will not mean that the plaintiffs' case stand proved. On the other hand, an omission of the defendants never helps or assists the plaintiffs. The plaintiffs must prove their own case. More so, on issues where burden is entirely on them. In such circumstances, absence of any witness being examined by the defendants or omission to put any question is not fatal. The defendants were not required to examine any witness because there is no burden on them. The documents are already admitted during the course of cross examination. In such circumstances, the suit be

dismissed.

39. With the able assistance of Mr.Vaze and Mr.Vashi I have perused the plaint, written statement, evidence of P.W.1, his cross examination and all documents placed on record. I am of the opinion that issue no.2 which is most crucial and material issue in the suit has not been proved by the plaintiffs and, therefore, the consequence that must follow is dismissal of the plaintiffs' suit. There is no question of this Court holding that the agreement and Indemnity Bond are false and fabricated so also not binding on the plaintiffs because there is no material in this behalf.

40. Therefore, for the reasons to follow, the only conclusion that can be reached is that the plaintiffs have miserably failed to prove their case and are thus disentitled from claiming any relief. The suit, therefore, deserves to be dismissed.

41. In so far as the plea of fraud is concerned, in the plaint all that is stated is that the defendants approached the plaintiffs through broker. The plaintiffs had identified the buyer abroad. The deal was stuck through one broker

Mr.Pratapbhai Jassani. The defendants offered to the plaintiffs their import licence (Ex.D-16 dated 24th June, 1983) for the purpose of import of Propylene Glycol under the agreement of December, 1984. In para 2 of the plaint, what is asserted is representation on behalf of the defendants that their import licence is valid and material could be imported against the same. There is an acceptance of the offer as is clear from the averments. In para 3 the plaintiffs themselves state that they forwarded their intent of M/s Chemet for supply of material on the terms and conditions set out in the letter dated 21st September, 1984 and payment was made against the same. They admit encashment of cheques and opening of the Letter of Credit. Thus, uptil the date of encashment of letter of credit, on the own showing of the plaintiffs, there has been no falsity nor misrepresentation. The version that the document of 8th October, 1984 being antedated is set out in para 5 of the plaint. For that purpose perusal of the document of 8th October, 1984 is necessary. That document has been marked in evidence as Exh.D-3. That is on a stamp paper of Rs.5/- purchased on 3rd October, 1984 in the name of the defendants. On 8th October, 1984 the contents have been written. The document is witnessed by three persons. The contents of the

document read thus:

> Amritlal Chemauz Limited Rang Udyan Sitaladevi Temple Road, Mahim BOMBAY 400 0016
>
> SUBJ: IMPORT OF PROPYLENE GLYCOL USP AGAINST ADDITIONAL LICENCE NO.P/W/3003791 DT.24.6.1983 TO THE EXTENT OF CIF VALUE RS.8,25,000/-
>
> I/We have entered into a Contract on 10.9.1984 for purchase of Propylene Glycol USP to the extent of C.I.F. value of Rs.8,25,000/- as per terms and conditions mentioned in the said Contract. In pursuance thereof, I/we have agreed and undertaken to indemnify you in respect of the said contract in case any penalty/BPT Demurrage charges, short levied customs Duty or any other charges levied by Customs Authorities and/or Bombay Port Trust. In case any objection is taken by Customs Authorities for clearance in respect of the importation of the said consignment of Propylene Glycol USP, we hereby agree to indemnify you for all the costs, charges, expenses, losses and damages that may be sustained by you for any breach of any import regulations under Import and Export Regulation Act, the intent being that at our request and responsibility you have imported the said material; on our behalf and at our risks on terms and conditions of the said contract."

42. In my view, when the plaintiffs confirm the contract of 10th September, 1984 with all the terms and conditions, then, it is futile to urge that this is an antedated document. If the document was antedated or that it was never in existence, then, plaintiffs ought to have led evidence to prove their case. They have not examined the broker. There is no explanation forthcoming with reference

to the signature of the partner of the plaintiffs and the stamp of the plaintiffs appearing on this document. In such circumstances, I am of the opinion that there is no substance in the case set up in para 5 of the plaint. The Indemnity Bond dated 8th October, 1984 is not antedated as alleged therein. If the case of the plaintiffs is that the agreement Exh.P-3 itself is false and incorporating several terms which were never agreed upon, then, there was no need for them to confirm the same on 21st September, 1984. I have perused the agreement Exh.P-3 and the letter of 21st September, 1984 Exh.P-1. A careful perusal of the same would reveal that the plaintiffs confirm condition no.3 appearing in Exh.P-3 at Exh.P-1. They also confirm import of product against additional licence and CIF value. They also confirm the letter of intent of M/s Chemet. They also confirm establishment of letter of credit. In such circumstances, which of the terms and conditions or statement at Exh.P-3 have never been agreed upon is not clear to me at all. On all factual issues and matters the parties are ad-idem. All that the letter of the defendants states is that the import policy applicable so also additional licence would be governing the contract. The indemnity bond is in token of condition no.4 and that is admittedly executed. I find nothing in

these terms and conditions which would enable me to conclude that the parties had never agreed to the stipulations at Exh.P-3. On the other hand Exh.P-3 elaborates the matter further. The broad terms are agreed between the parties and that is clear from Exh.P-1. Elaboration of the same is merely done by Exh.P-3. Even prior to Exh.P-1, its contents would reveal that in talks with the broker on 9th September,1984 so also on earlier occasions that the parties decided to enter into the deal. What has been put on paper is this agreement which was confirmed by Exh.P-1. In such circumstances, there is no substance in the contention that the contract is not binding upon the plaintiffs. I am unable to hold that issue no.1 is proved in these circumstances. The said issue is answered in the Negative.

43. The real and the only issue between the parties is whether the plea raised by the plaintiffs that the licence was defective is correct and that is substantiated by the version of their witness and contents of Exh.D-16.

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44. Both issues were to be proved by the

plaintiffs. The submission that defendant did not step into the box nor lead any evidence cannot be accepted.

45. It is well settled and does not require to be restated that section 104 of the Evidence Act states that burden of proving any facts necessary to prove them in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence. Relying upon this and analogous principles it has been observed repeatedly that the plaintiff must succeed on his own case, especially when he has to prove a fact the onus of which is upon him. He cannot succeed merely because the defendant has not led evidence or that there are some weaknesses in the case of defendant. Thus, once the plaintiff has to succeed on the strength of his own case, he can succeed by adducing sufficient evidence discharging the onus that is on him irrespective of whether the defendant has to prove his case or not. In the present case, on both issues viz., whether the agreement and indemnity bond are false and fabricated and not binding on the plaintiff so also whether there was any defect in the defendant's licence, the onus clearly was on the plaintiff. The plaintiff has not led any evidence to show and

prove the defect in the licence.

46. Despite this I have with the assistance of Mr.Vaze perused the original Licence and the import policy. Once, the import policy sets out the facilities available to export houses and they are allowed facilities to import, items placed under Open General Licence category in the manner set out in the policy and more particularly in para 185(1) so also on the strength of the additional licence as stipulated in para 186(1) of the same, then, it is futile to urge that the licence was defective. Licence as also the additional licence and annexures thereto sufficiently demonstrate that the items under the open general licence for import could have been imported against the licence Exh.D-16. Thus, there is no explanation forthcoming as to why consignment was not allegedly cleared by the Authorities. A mere statement of the plaintiff in that behalf so also the assertion that the licence was defective is not enough. The nexus of non clearance of the consignment with that of the licence stipulations and conditions ought to have been established by the plaintiff. That having not been done so also plaintiff not examining either broker or the Custom clearing agent in that behalf would show that the licence is

not defective as alleged. That apart, having perused the licence and the terms and conditions together with all Appendices and the Import policy, to my mind, there is no prohibition in importing of subject product. That the said product has been imported against the said licence earlier is clear from a perusal of Item No.17 to the Appendix of the licence. There is no explanation forthcoming as to how this consignment against the same licence was allowed to be imported. The subject consignment, therefore, could have been imported as the licence was admittedly valid and subsisting. There is no merit in the submission of Shri Vashi that the licence is defective.

47. Having held that the plaintiff has failed to prove issue Nos. 1 and 2 and the finding thereon has to be in the negative, then, it is clear that the defendant is not liable to refund the sum of Rs.98,000/- with interest as claimed by the plaintiff.

48. Once the licence was not defective so also the plaintiff not leading any evidence, either to prove defect therein or the alleged delay in clearance of the goods, then, the claim for damages cannot be awarded.

49. In the light of the above, I find much substance in the contentions of Mr.Vaze that defendant No.4's claim in the instant suit is identical to that in the City Civil Court and it has been dismissed as well.

50. Reliance by Mr.Vashi on the decision of the Supreme Court in the case of Vidyadhar Vs.Manikrao and another reported in A.I.R. 1999 S.C.1441 is misplaced because there the presumption was drawn by the Supreme Court in the facts which were placed before it. It is clear from the decision of the Supreme Court that the appellant had filed the suit against the respondents before the Supreme Court for redemption of mortgage by conditional sale or in the alternative for a decree of specific performance of the contract of re-purchase. That suit was decreed by the trial court and the Judgement was affirmed by the lower appellate court and High Court had reversed the said judgement in second appeal. It is in these facts and when the Supreme Court considered the issues, that the observations in para 17 which have been relid upon have been made. It was the case of defendant before the Supreme Court that the sale deed executed by defendant No.2 in favour of the

appellant before the Supreme Court was vexatious and bogus. That plea was not supported by the defendant No.1 as he did not enter into the witness box. He did not controvert the fact and avoided witness box so that he could not be cross examined. This was enough in the opinion of the Supreme Court to reject the claim that the transaction was bogus one.

51. Mr.Vashi seeks to derive assistance from this judgement and submits that the defendant did not enter into the witness box so as to avoid being cross examined by the plaintiff. There is no merit in this submission inasmuch as perusal of the issue would show that it was for the plaintiff to prove that the agreement and bond was false and fabricated and not binding on it. It was for the plaintiff to prove that there was defect in the licence. In such circumstances, it is immaterial whether the defendant steps into the witness box or not. That burden has not been discharged by the plaintiff is already observed by me. I, therefore, proceed to record my findings on the issues framed above.

1. No.

2. No

3. No.

4. No.

5. Suit dismissed.

54. The only consequence of the above discussion is that the plaintiff fails to succeed.

55. In the light of the above, the following order. Suit is dismissed. No order as to costs.

(S.C.DHARMADHIKARI J.)